TEH KHEM ON & ANOR.

v.

YEOH & WU DEVELOPMENT SDN. BHD. & ORS

HIGH COURT MALAYA, IPOH
DATO' PEH SWEE CHIN FCJ
[SUIT NO: 1759 OF 1985]
15 APRIL 1995

CONTRACT: *Sale and purchase of property - Claim against developer for damages to property - Damage caused by settlement and sinkage - Damage occuring after expiry of defect liability period - Whether developer liable for breach of contract - Purchase price paid in full and property conveyed into names of purchasers - Whether contract could be rescinded ab initio - Whether developer liable for damages - Measure of damages.*

TORT: *Defective premises - Claim against architect and engineer for negligent design and supervision of construction work - Whether there was a duty of care - Type of loss - Pure economic loss - Whether recoverable.*

The plaintiffs entered into a sale and purchase agreement to purchase a house built by the first defendant. Subsequent to taking possession of the house the plaintiffs discovered that the house had tilted and was sinking. The plaintiffs moved out of the house and claimed for recission of the sale and purchase agreement, refund of the purchase price and damages for breach of contract. The plaintiff further claimed damages in negligence against the architect and the engineer of the housing project for negligent design and supervision.

The defendants argued that they were not liable as the damage had occured after the expiry of the 12 month defect liability period as embodied in the sale and purchase agreement.

Held:

[1] The damage to the house was due to settlement or subsidence of the house especially and principally due to differential settlement significantly contributed to by the fact that the fill for the building site on which the house was to be built was far too thick, and was comprised of loose silty sand which was not sufficiently compact. The settlement was also caused by inadequate piling which had not been driven to refusal and the damage to the house is extensive and ongoing as the house is continuing to sink.

[2] By the sale and purchase agreement the first defendant has direct contractual relations with the plaintiffs. The sale and purchase agreement did not provide for exemption from settlement or subsidence of the house

and it is clear that the first defendant is in breach of clause 12 of the agreement which provides for the house to be constructed in a good and workmanlike manner.

[3] The defect liability clause does not take away the right to sue in respect of such defects which were not discoverable within the defect liability period. Even if the defects were discovered within the defect liability period, the provision of an express remedy of making good the same defects will not *ipso facto* take away the rights of any purchaser which normally follow at common law in the case of a breach of contract.

[4] Since the purchase price had been paid in full by the purchasers, the land on which the house stands has already been conveyed to the purchasers and the settlement or subsidence of the house has appeared after such conveyance, the purchasers are only entitled to claim damages for breach of conditions both express and implied and not for recission of the contract ab initio. In the circumstances of the present case the measure of damages would be the cost of remedying the defect, namely the estimated cost of micropiling. Furthermore as the cost of reports and experts investigating into the causes of the damage to the house was pleaded and proved, the sum incurred should be allowed.

[5] The claim against the architect and the engineer relate solely to the defective condition of the defective house with the plaintiffs seeking to recover damages in regard to such defective condition and expenses in connection therewith. The claims of the plaintiffs are therefore for pure economic loss and following the case of *D&F Estates v. Church Commissioners for England* is not recoverable in negligence.

[Plaintiffs' claim against first defendant allowed with half costs. Plaintiffs' claim against the second and third defendants dismissed]

Cases referred to:

Anns v. Merton London Borough Council [1978] AC 728; [1977] 2 WLR 1024 ***(not foll)***

Bowel v. Paramount Builders Ltd. [1975] 2 NZLR 546 ***(not foll)***

D & F Estates v. Church Commissioners for England [1989] AC 177 ***(foll)***

Dakin v. Lee [1916] 1 KB 566 ***(foll)***

Department of the Environment v. Thomas Bates & Sons Ltd. [1990] 2 All ER 943; [1990] 3 WLR 457 ***(foll)***

Donoghue v. Setevenson [1932] AC 562; [1932] All ER Rep 1 ***(refd)***

Dutton v. Bognor Regis Urban District Council [1972] 1 QB 373; [1972] 1 All ER 462; [1972] 2 WLR 299 ***(not foll)***

Hadley v. Baxendale [1843-60] All ER Rep 461 ***(foll)***

Hancock & Ors v. BW Brazier Ltd. [1966] 2 All ER 901; [1966] 1 WLR 1317 ***(foll)***

Junior Books Ltd. v. Veitchi Co. Ltd. [1983] 1 AC 520; [1982] 3 All ER 201; [1982] 3 WLR 477 ***(not foll)***

Lawrence v. Cassel [1930] 2 KB 83; [1930] All ER Rep 733 ***(foll)***
Miller v. Cannon Hill Estates Ltd. [1931] 2 KB 113; [1931] All ER Rep 93 ***(foll)***
Murphy v. Brentwood District Council [1990] 2 All ER 908; [1990] 3 WLR 414 ***(foll)***
Stephen Forsyth v. Ruxley Electronic & Construction Ltd. & Anor. [1993] 66 BLR 28 ***(foll)***
Sutherland Shire Council v. Heyman [1985] 60 ALR 1 ***(refd)***
Thornton v. Place [1832]1 Moo & Rob 218 ***(foll)***
Ultramares v. Touch [1931] 255 NY 170 ***(foll)***

For the plaintiffs - Leslie TL Yeap; M/s. Yeap & Yeap
For the first defendant - Ng Seng Ym; M/s. Loh Poh Seng & Co.
For the second defendant - Ooi Kheng Boon; M/s. Ooi & Associates
For the third defendant - Chan Kok Keong (Ti Chin Chu-Ann with him); M/s. Chan & Associates

JUDGMENT

Peh Swee Chin FCJ:

It is rather remarkable that while the purchase price of the house in this action is a mere RM78,5000, the parties to this action have involved not only a housing developer-cum-vendor, but also a firm of architects, a firm of engineers and the local authority of the area in which the house in question is situated. What is really amazing is that the legal position on which this action must have depended when it was filed, literally has gone through nothing short of a revolution by the time the hearing of this very long case was concluded on 14 January 1995. First, the evidence of the case need be set out and I will try to make short work of it without losing sight of the salient points, however.

The plaintiffs above entered on 29 November 1983 into a sale and purchase agreement (P1) with the first defendant, a builder-cum-vendor when buying a double-storey link house amongst a row of similar houses for the sum of RM78,500 (the plaintiffs are hereafter calleld 'the purchasers' and the first defendant, "the vendor/builder'). Clauses of the agreement which are relevant to this judgement are set out below:

> 12 The said building shall be constructed in a good and workmanlike manner in accordance with the specifications described in the second Schedule hereto and in accordance with the plans approved by the appropriate authority or other competent authority which specifications and plans have been accepted and aapproved by the purchaser as the purchaser hereby acknowledges ...
>
> 23 Any defect, shrinkage or other faults in the building which shall become apparent within a period of twelve (12) calendar months after the date of delivery of vacant possession to the purchaser and which are due to defective workmanship or materials or the said building not having been constructed in accordance with the said specifications and plans as approved by the appropriate authority (amended or unamended as the case may be) shall be repaired and made good by the vendor at his own cost and expense within one month of its having received written notice thereof from the purchaser ...

The purchasers took possession of the house in November 1984, and then found cracks on the walls, that the ground was not even, and one of the ceiling boards had apparently been replaced earlier but it had not been painted, with the bathroom upstairs leaking. On being informed, the vendor/builder caused repairs to be carried out. The purchasers then moved into the house. One or two weeks later, they found that the back door could not be closed, the house itself seemed to tilt to one side and to be sinking too with a long crack being seen between the kitchen and the lounge, vide P11, the group of the photographs. The purchasers then moved out of the house in August, the following year, in 1985. The Lembaga Letrik Negara disconnected the electricity supply to the house after an inspection of the house, apparently for the sake of safety. Solicitors for the purchasers wrote to the vendor/builder which admitted the liability to repair the defects. This Court observes the unusual commercial integrity of the vendor/builder from the evidence in this case, even though the Court would have to make findings of liability or non-liability according to the usual criteria.

It would appear that the neighbouring houses were similarly affected. The vendor/builder even then, already attributed the problem of these cracks, etc to the movement of soil underneath the land caused by a stream nearby due to the dry season, an allegation, of course, that remained to be proved.

As more cracks appeared, the vendor/builder wanted to carry out 'cement-grouting' to remedy the problem and the purchasers felt they had enough of these repairs and wanted an assurance that such cement-grouting would really be a measure that would remedy the problem, and would be a guarantee of its non-recurrence. The vendor/builder would not give such a guarantee or assurance. A stalemate was reached in which the purchasers would not allow this cement-grouting to be done. The vendor/builder felt compelled to file the present action claiming a mandatory injunction against the purchasers so that it be allowed to carry out the cement-grouting.

The purchasers facing such a claim for a mandatory injuction have counterclaimed against the vendor/builder for rescission of the sale and purchase agreement, refund of the purchase price and damages etc.

The purchasers have further counterclaimed against the architects, ie the second defendants, the engineers, ie the third defendants, and the local authority of Batu Gajah, ie the fourth defendant, by bringing in all of them as the new parties for the purchasers to proceed with their counterclaim against them.

I believe I indicated to all the parties at the outset of the hearing that the purchasers would be hereafter cited and referred to as the plaintiffs; the vendor/builder, the first defendant, the architects, the second defendants, the engineers, the third defendant, and the local authority of Batu Gajah, the fourth defendant, to reflect the true nature of this action at that time. All parties were aware that by that time, the earlier sole claim for the mandatory injuction aforesaid

by the vendor/builder had been met by a consent order of both the vendor/ builderand the purchasers, so that for all practical purposes, the earlier part of the action for the said sole claim had by then spent itself.

A consent order dated 9 April 1986, in respect of the injunction mentioned above was granted and cement-grouting was duly carried out before the hearing of evidence *viva voce* of this case.

The purchasers at great cost engaged a firm of experts, viz Dr. WH Ting Consultants Sdn. Bhd. in November 1985, for the purpose of this action and the consultants rendered their reports, being P20A, P20B, P20C,P20D and P20E.

P20A describes the instrumentation scheme method and the amounts of fee required. After the receipt of P20A, the purchasers gave instructions to proceed further. P20B describes the preliminary result of soil investigations, and P20C, the final result. P20D was intended as a 'factual report'. P20E describes the findings by way of a final report. Detailed evidence was given on these P20A-E in connection with the boring test, general water measurement, MacKintosh probe test, 'shear vane test', and monitoring work on the damage.

I find from the report and evidence of experts as follows.

In regard to the filling and levelling of the land before construction of the purchasers' house started, the filling was done with 'very loose silty sand'.

Before this 'fill' or filling, the soil itself was of compressible strata. Piling work was found to be done. Settlement or subsidence of the house was found near the front and rear parts of the house, respectively. Settlement was found to be continous at rates varying between 0.02-0.15mm per day, settlement at the rear of the house being higher than in the front of the house. Cracks appeared to be still growing with increasing tilting of the house. Settlement was found to be ongoing.

The damage to the house was due to total and differential settlements, the latter would mean that, e.g. if one part of the house settled more than another part, damage would be caused. The monitoring work on the 'fill' or filling was carried out 2-1/2 years after the fill was placed.

The primary settlement or consolidation was under the fill of the soil comprising the said compressible strata. Additional or secondary settlement or consolidation took place, when 'the partially saturated fill' collapsed and also due to secondary consolidation of the compressible strata below the fill. Dr James Wong (PW2), one of the experts called, explained to the effect as follows about the saturated fill collapsing. When any soil was compacted, it had minimal consolidation or settlement, but if the same soil was further soaked, it would

collapse in time, soaking could be due to inundation by rainfall or flooding. As regards the lowering of the water-table suggested by the defence, Dr James Wong said the contribution to settlement was negligible.

I cannot help remarking even at this stage that I found the evidence of Dr. James Wong, the knowledgeable young engineer, consistently convincing and reasonable, despite bearing in mind the small risk of his partiality for the purchasers who called him.

Dr Wong said further to the effect, that to avoid collapsed fill causing the secondary settlement, the control of compaction of the fill itself was very important during the work of the filling, by having regard to the thickness of the fill. One would also expect the fill to be compact rather than that of 'loose silty sand' as found in this case.

In this connection, the engineer from the third defendants' firm (hereafter called 'the engineer'), recommended a fill of 31/2 ft, ie about 1m thickness, P20E shows that the average fill was more than 2m in thickness which according to the evidence of DW5, called by the defendants, would settle more than if it was less thick. The engineer did not supervise the fill, and it would seem to suggest that somebody responsible for bringing on the fill material to the building site had presumably increased the value of the fill material by bringing more of it than was necessary.

First, the Court concludes, to summarize, that damage to the house was due to settlement or subsidence of the house, especially and principally due to differential settlements, ie due to differential rates of such settlements, especially between the area in the front of the house and at the rear of the house, respectively.

Secondly, the Court concludes that the fill for the building site on which the house in question was to be built was far too thick, ie an average of 2m in thickness instead of the recommended thickness of just over 1m (31/2ft to be more precise); that the materials of the fill was unsuitable, being loose silty sand, was not sufficiently compact; and that these factors caused in a material way, or significantly contributed to the aforesaid settlement.

Before giving my third conclusion, I will deal with another important causative aspect of the damage to the house.

According to Dr James Wong, settlement of a house was also related to stability of a foundation of a house. A stable foundation should not move. If a foundation was not stable, the building would collapse. In designing a foundation, the purpose was to transmit the load to the soil, if the soil was competent to support the load. Using piles was an alternative if the soil was not competent to support the load. Piles were used in this case.

The Court observes that piles were columns of metal or concrete to be sunk deep into the ground to support columns and walls of a building on the ground.

Dr Wong said that the settlement of the house was due to the movement of the piles which, if stable, would not move. If the piles were driven to refusal, ie to the point where it could not be driven further due to strong resistance, one would not expect any significant movement of the piles. He said to the effect that if the piles were not driven to refusal, if the piles just rested on compressible strata (below the fill), 'negative skin friction' would be caused, ie the soil would move up past the piles in turn causing the piles to move or causing damage to the piles. If the piles were moved or damaged, the house itself would settle.

I therefore conclude, thirdly (ie my third summary finding), that settlement was also caused by inadequate piling or piles which have not been driven to refusal, in other words, by rather inadequate foundations for the house in question.

Fourthly, I conclude that the damage to the house is extensive and ongoing, and that cement-grouting has not arrested the settlement or subsidence in question so that the house is continuing to sink albeit more slowly. More and more damage is anticipated as time goes on. It would not be reasonable to expect the purchasers to contemplate moving into it again.

Arising from the conclusions thus reached, the Court next considers if each of the defendants is liable, one by one, if necessary.

First, the Court deals with the first defendant, the vendor/builder.

The vender/builder by P1, has direct contractual relations with the purchasers. Looking at P1, ie the sale and purchase agreement, subsidence or settlement of house and exemption of liability therefore have not been provided for in the agreement. There is neither any *force majeure* clause of appropriate wording so as to exempt the vendor/builder in another way from such liablity. The Court has no hesitation unless the defences of the vendor/builder succeed, in saying that the vendor/builder is in breach of cl. 12 which provides for the house to be constructed 'in a good and workmanlike manner'. The vendor/builder should therefore normally be liable to the purchasers, subject to other issues or defences raised against the purchasers as stated below.

The vendor/builder has laid a great deal of stress on the earlier refusal of the purchasers to permit the vendor/builder to carry out cement-grouting causing the present action to be filed in the first place, it will be remembered. The cement-grouting has been found by this Court to be ineffective in stemming off the settlement or subsidence so that it would not affect the damages payable by the vendor/builder under cl. 12 of PI. Thus, the conduct of the purchasers in regard to their said earlier refusal falls short of unreasonableness, though one could sense the frustrations and anger which must have driven

the purchasers then to behave in that way. As one of the defences, by way of saying that purchasers have failed to mitigate the damage, such defence fails.

Again, the vendor/builder and in fact, other defendants, all have joined in a common subsmission by way of defence that the damage occured after the defect liaibility period mentioned in cl. 23 of PI.

I share the view espoused by Lord Denning in *Hancock & Ors v BW Brazier Ltd.* [1966] 2 All ER 901;[1966] 1 WLR 1317, to the effect that such clause similar to cl. 23 in our instant appeal about making good structural defects discovered within six months, would not take away the right to sue in respect of such defects which were not discoverable within such six months, and that further in regard those defects discovered within the six months, the provision of an express remedy of making good the same defects will not *ipso facto* take away the rights of any purchaser which normally follow at common law in the case of a breach of contract. It is pertinent to mention that our cl. 23 provides for 12 months instead of six months. The same princples would apply.

Thus, the said line of defence also fails.

Reverting in general to the question of direct contractual relations between the purchasers and the vendor/builder and in particular to clause 12 of the agreement about building the house 'in a good and workmanlike manner'; even apart from liability under cl. 12, there are three implied terms when a purchaser buys a house from a builder who contracts to build it. The purchasers herein can also rely on them. The implied terms are first, that the builder will do his work in a good and workmanlike manner; secondly, that he will supply good and proper materials and thirdly, that it will be reasonably fit for human habitation, but any of such implied terms could be expressly excluded by contract; see *Lawrence v Cassel* [1930] 2 KB 83; [1930] All ER Rep 733, *Miller v Cannon Hill Estates Ltd.* [1931] 2 KB 113: [1931] All ER Rep 93, and *Hancock* [1966] 2 All ER 901;[1966]1 WLR 1317 at p. 1332. These three implied terms have often been lumped together as a 'threefold implied warranty'; which could give rise to an inaccurate impression that for the implied warranty to apply, the three implied terms must be present at the same time. They need not all be present in any particular case. I prefer to call such implied warranty, the three implied conditions.

The vendor/builder is clearly in breach of cl. 12 of the P1, and also in any event, in breach of each of the implied conditions aforesaid. The vendor/builder is therefore liable to the purchasers. Such being the case, it would not be necessary to determine for the time being whether the vendor/builder is liable also in negligence to the purchasers as pleaded.

The Court next deals with the terms or particulars of judgement it should enter for the purchasers against the vendor/builder, and it is inevitable that the Court would have to look at the prayers of the statement of claim.

By prayer (1), the punchasers claim an order that the said agreement dated 29 November 1983 "be rescinded' and that the vendor/builder do repay the purchasers the sum of RM78,500, being the purchase price. There is something unusual about this prayer.

The words 'be rescinded' could normally refer to the rescission *abinitio* in equity for lack of free consent in regard to fraud, mistake, etc which vitiates free consent and which also involves the remedy of *restitutio in integrum*. When a contract is thus rescinded, it is abrogated as if it had never been made.

The same words by themselves, could sometimes refer to a termination of a contract by an innocent party to a contract on account of a breach of the contract committed by the other party where the innocent party treats the contract as at an end with the usual legal consequences.

In the light of what has just been stated, the prayer (1) sounds like a rescission *ab initio* being asked for with the demand of the refund of the full purchase price. But, the cause of action and the evidence on which it is based are one of ordinary breach of contract, and not an equitable claim or rescission of contract *ab initio*. The claim for refund of the purchase price which is consistent normally with a rescission *ab initio* will thus be disallowed.

The claim for rescission of contract for its breach could be considered by the Court though it is unusual;unusual because a victim of a breach of contract usually terminates or rescinds the contract for breach before going to Court, instead of asking for an order for such rescission for breach. This could mean that the purchasers had some doubt about the sufficency of their cause of action and wanted the Court to adjudicate thereon.

Since the purchase price has been paid in full by the purchasers; the land on which the house stands has already been conveyed to the purchasers and the settlement or subsidence of the house has appeared after such conveyance, the purchasers are only entitled to claim damages for breach of conditions both express or implied as stated above.

I now deal with the measure of damages for the defective building or house in question. We are not dealing with those common cases of failure to transfer land pursuant to a contract. Thus, the normal measure of damages in this case is more unusual, and could be gauged from the old case of *Thornton v. Place* [1832] 1 Moo & Rob 218, in which the builder was held entitled to receive the price of a defective building 'subject to a deduction and the measure of that deduction is the sum which it would take to alter the work so as to make it correspond with the specification'. The view was approved in *Dakin v. Lee* [1916] 1 KB 566. Please see also *Stephen Forsyth v. Ruxley Electronic & Constructions Ltd. & Anor.* [1993]66 BLR 28.

The normal measure of damages would therefore be the cost of remedying the defect, and such cost is RM98,625 the estimated cost of micropiling.

This sum is however, disproprotionately large, so that it has the potential effect of offending the general principle that a victim of breach of contract should not be put in a better position than if there had been no breach of contract. It will be remembered that the contract price of the house in question and the land on which it stands is RM78,500. The Court may thus have to find if any, another measure of damages. Another possible measure of damages will be the cost of the building the house in question minus the land. Of this, there is no evidence and neither the cost of relevant land and that of the relevant house are apportioned in the sale and purchase agreement in question. The Court is thus compelled to adhere to the cost of remedying the defect, and I therefore conclude that the purchasers are entitled to the sum of RM98,625.

I may just as well point out that what the purchasers will do with the sum of RM98,625 is entirely up to them, and the builder/vendor should not be heard to say later that the purchaser ought to have been ordered to spend this sum in actually carrying out the said micropilling. Please see the case of *Stephen Forsyth,* for a decision also to this effect.

In connection with and arising out of the defective house in question, investigation was conducted by experts into the causes of the damage to the house. The cost of reports of such experts totalling RM21,141.35 would be allowed. This was pleaded and proved. As regards other claims of expenses they will not be allowed because either they were not proved by evidence, or they have not arisen naturally in the usual cause of things from the breach of contract, ie breaches of the express and implied conditions referred to above. Such other claims of expenses are expenses incurred for executing a charge in the land on which the house stands to some finance company, payment of relevant interest on housing loan to that finance company. To amplify, such expenses were not communicated to the vendor/builder with a view to making a potential claim for them in the event of breach of contract, so that both parties would have had the advantage of making suitable provisions for them in their contract; to quote a sentence in this connection from that celebrated passage in *Hadley v. Baxendale* [1843-60] All ER Rep 461; '... of this advantage, it would be very unjust to deprive them'.

The Court now begins to deal with the most difficult part of this case regarding the purchasers' claims against the other defendants, viz the architects, the engineers and the local authority, respectively in negligence.

It ought to be mentioned at this stage that in the middle of the case, the purchasers sought and obtained leave to discontinue wholly the action as against the local authority, ie Majlis Daerah Kinta Barat, Batu Gajah, with costs to

the fourth defendant to be taxed. It is believed that some statutory exemption of liability of the kind against the local authority was behind this surprising move.

The Court now deals with the purchasers' claims against the other defendants in negligence.

The claim against the architects is in negligence for, *inter alia*, failure to investigate the nature of the soil on the land on which the house stands, to supervise and inspect the construction of the foundations of the house, or for issuing certificate of completion of the foundations etc.

The claim is in negligence likewise against the engineers for, *inter alia*, failure to design adequate foundations, failure in designing adequate piling, and failure to submit the earthwork plans to the proper authority, etc.

There is however, a formidable obstacle to such claims in negligence against the engineers and architects as the claims, in the circumstances of this case, relate solely to the defective condition of the defective house with the purchasers seeking to recover damages in regard to such defective condition and expenses in connection therewith, eg the investigation expenses in regard to such defective condition.

The claims are therefore for pure economic loss, and such pure economic loss is not recoverable in negligence in the circumstances of this case. The revolution, the Court spoke of earlier in this judgement, concerns the legal position of the claimability of such pure economic loss in connection with dangerous products of manufacturers and defective houses in actions in negligence between parties not governed by any contractual provisions. The Court owes an explanation which will neither be free from difficulty nor short, for holding such claim in this case to be irrecoverable. The Court will deal with such position compendiously.

The term pure economic loss or just economic loss is a broad term incapable of any comprehensive definition, but dependent for its meaning and effect on the context of circumstances in which the term is used, etc. but the meaning in this case will become apparent later.

It all started with the landmark case which everyone concerned with the law knows, ie the case of *Donoghe v. Stevenson* [1932] AC 562; [1932] All ER Rep 1. For the purpose of the instant action, three things happened in that case and one of them is of tremendous import.

The case first decided that a manufacturer of products would, despite the absence of contractual relations (from which liability could have been normally affixed on a manufacturer), owe a duty of care to an ultimate consumer of

such a defective product to avoid: (a) causing injury to the person of such consumer; and (b) causing damage to the property of such consumer other than the defective product.

That case decided also expressly or by taking for granted, that any compensation for the loss or damage to that defective product itself is not claimable, so that the damage to property mentioned earlier in the preceding para. is not to include the damage for the defective condition of the defective product that gave rise to the injury or damage. This situation is hereafter referred to as the said limitation. Such claim for such compensation for such defective condition of the defective product is a claim for pure economic loss or economic loss; the expression has therefore acquired a rather special and loaded meaning in the instant case.

In the same vein, it would be instructive for all to read once more a passage of Lord Brandon's dissenting speech in the extraordinary case of *Junior Books Ltd. v. Veitchi Co. Ltd.* [1983] 1 AC 520 at p. 551; [1982] 3 All ER 201 at pp. 217-218; [1982] 3 WLR 477 at p. 499:

> The first consideration is that, in *Danoghue v. Stevenson* [1932] AC 562; [1932] All ER Rep. 1 itself and all the numerous cases in the principle of that decision has been applied to different but analogous factual situations, it has always been either stated expresssly, or taken for granted, that an essential ingredient in the cause of action relied on was the existence of danger, or the threat of danger, of physical damage to persons or their property, excluding for this purpose the very piece of property from the defective condition of which such danger, or threat of danger, arises. To dispense with that essential ingredient in a cause of action of the kind concerned in the present case would, in my view, involve a radical departure from long-established authority.

The decision of *Donoghue*, in addition, has some earth shattering quality in having formulated a general duty of care as a solid foundation to the tort of negligence where there was no such general duty before, it having being based on the forseeability of harm, vide the part of Lord Atkin's speech about the love-your-neighbour principle is too well known to need its repeating. Consequently, there have been a greatly increased number of actions, which hitherto were regarded as not possible, with a corresponding increase of categories of plaintiffs and defendants, with the new general duty of care thus formulated being applied.

It is generally believed and agreed that the rationale for Lord Atkin's confinement to the injury to the person of plaintiffs and the damage to the property of the plaintiffs other than the aritcle or product that caused such injury or damage, is to avoid the creation of liability 'in an inderterminate amount for an indeterminate time to an indeterminate class', to quote what is said to be the words of Cardozo CJ in the American case of *Ultramares v. Touche* [1931] 255 NY 170 at p. 179, words that pithily and vividly describe the underlying policy of the law on the said limitation.

Another important matter to bear in mind is that the principles of liability for unsafe or defective products by virtue of a latent defect in them as exemplified by *Donoghue* have been long extended to defective houses of builders, like the house in question herein.

Most probably for doing justice in those 'hard' cases, the Courts for a long time brushed aside the said limitation and awarded damages for pure economic losses in similar cases, and among such notable cases is the case of *Dutton v. Bognor Regis Urban District Council* [1972] 1 QB 373; [1972] 1 All ER 462; [1972] 2 WLR 299, where the council was sued for negligently approving the foundations of a house built on a rubbish dump. The walls had cracked and the doors and windows would not close and the foundations were found to be totally inadequate and the plaintiff sued, claiming loss by virtue of loss in value of the house there and cost of repairs. The Court of Appeal upheld the judgment of the trial Court.

The decision in *Dutton* was later to be overruled in *Murphy v. Brentwood District Council* [1990] 2 All ER 908; [1990] 3 WLR 414, in which the same decision was held to be wrong and Lord Bridge had this to say [1990] 2 All ER 908 at p. 924; [1990] 3 WLR 414 at p. 434: 'That decision was certainly without precedent and was, I think, widely regarded as judicial legislation', more about the case of *Murphy* later.

After Dutton, came the highly controversial case of *Anns v. Merton London Borough Council* [1978] AC 728; [1977] 2 WLR 1024, which approved the decision of *Dutton*. In *Anns*, the foundations of the house in the form of a concrete raft had settled or subsided differentially causing cracks to the house there and damage to its gas and soil pipes The owner of the house sold it and sued the Merton London Borough for negligently approving the foundations. It appears that the defendant borough had sought, before granting such approval to the foundations, advice of independent consulting engineers. Judgment was entered for the plaintiff.

Anns case was followed in New Zealand in *Bowen v. Paramount Builders Ltd.* [1975] 2 NZLR 546, a New Zealand Supreme Court case also involving inadequate foundations of a house causing settlement and cracks. *Anns* was followed, in regard to the recoverability in tort of such pure economic loss against a defective crane manufacturer.

Anns case was not followed by the High Court of Australia in *Sutherland Shire Council v. Heyman* [1985] 60 ALR 1.

There are many cases which are not mentioned in the judgment and which allowed for recovery of pure economic loss in an action in tort. This is neither the place nor the time to discuss all of them.

Anns case, allowing the recovery of pure economic loss began to be seriously disputed and dissented from, in *D & F Estates v. Church Commissioners for England* [1989] AC 177, in which an action in negligence was filed against the main contractors of a flat for defective plastering therein in the sum of RM10,000. The House of Lords disallowed the claim of the plaintiff on the ground of the damage being to the defective property itself and not to the plaintiff's other property or personal injury.

That was the revolution I spoke of in the beginning of this judgment in the context of *Anns* and other similar cases and *D & F Estates* later over the years since *Donoghue*. On reflection, it was not only a revolution but also a restoration to the status quo before *Dutton* and *Anns* but after *Donoghue*, to the traditional principle explained above, i.e. the said limitation.

The decision of *D & F Estates* in the House of Lords, in so far as it concerns the non-recoverability of such pure economic loss as described above by an owner of the house against the builder in tort, i.e. by way of an action in negligence, was confirmed twice by the House of Lords in *Murphy v. Brentwood District Council* and *Department of the Environment v. Thomas Bates & Sons Ltd.* [1990] 2 All ER 943; [1990] 3 WLR 457.

If the liability of a builder of a defective house in negligence is subject to the limitation I explained above, an architect or engineer for similar reasons in the absence of any direct contractual relationship with the owner of a building, cannot also be liable in negligence in a claim for pure economic loss, i.e. for economic loss for or on account of the defective condition of the defective building.

For the reasons above, the claims against the architects (second defendats) and the engineers (third defendants) would have to be dismissed.

In retrospect, to deal with or to overcome those 'hard' cases in order to mete out ideal justice, a Court ought not to overturn a general established principle of law but should only apply it to facts or situations amenable to it. Where this is not possible, then let the custodians of the public conscience, viz members of that august body called Parliament, deal with any urgent or topical situation by legislation with appropriate details and retrospective effect as desired, otherwise confusion will be caused to the law, increasing the vulnerability of the Court to the criticism its being engaged in out and out legislation.

The Court's sympathy is also with the vendor/builder which has shown such a splendid attitude of commercial responsibility, by even going to Court to compel the purchaser to allow repair work (though proved to be abortive later), to be done.

On facts of this case, when the purchasers cited or sued the engineers and architects, the purchasers had a practically unanswerable case against both of them by virtue of *Dutton and Anns*, but the same case against them foundered when *D & F Estates* and *Murphy* were decided. Though the architects and engineers have succeeded against the purchasers and in the context of the circumstances in this case, they have so succeeded in truth on a technical point, for the inadequaate foundations of the house in question and the extra thickness of the 'fill' have yet to be accounted for. Considering all these in connection with also the comparatively small value of the house in question, the architects and engineers should get no costs against the purchasers.

On the question of costs as between the purchasers and the vendor/builder, the latter has earlier obtained the mandatory injunction in the action with costs to be taxed. Considering this in conjunction with the value of the house in question also, the purchasers should get 1/2 costs only.

I therefore order as follows:

(1) that the sale and purchase agreement dated 29 November 1983, between the first defendant of the one part and the plaintiffs of the other part, be hereby terminated for breach of contract;

(2) that the first defendant is to pay forthwith a sum of RM98,625 with interest at 8% pa thereon, from date of judgment to date of satisfaction to the plaintiffs, and further, 1/2 costs to be taxed;

(3) that further, the first defendant is to pay forthwith RM21,141,35 with interest at the rate of 4% thereon, from date of action to date of judgment and thereafter at 8% to date of satisfaction; and

(4) that the claims of the plaintiffs against the second defendants and the third defendants be dismissed but there be no order as to costs.

Reported by Satish Nair